No. 82-136

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IN THE

Supreme Court of the United States

October Term, 1982

CHARLES BEN HOWELL, Suing on Behalf of Himself and All Other Persons Similarly Situated as a Class,

Petitioner,

against

MANAGEMENT ASSISTANCE, INC., GENESIS ONE COMPUTER CORPORATION, ROBERT W. BEREND, RAYMOND P. KURSHAN and CHARLES F. TRAYES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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CHARLES BEN HOWELL, Suing on Behalf of Himself and All Other Persons Similarly Situated as a Class,

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RESPONDENTS' BRIEF IN OPPOSITION

Preliminary Statement

Respondents Management Assistance Inc., Genesis One Computer Corporation, Robert W. Berend, Raymond P. Kurshan and Charles F. Trayes ("Respondents") respectfully request that this Court deny the petition of Charles Ben Howell ("Petitioner") for a writ of certiorari, seeking

review of the Judgment of the United States Court of Appeals for the Second Circuit in this case. That Judgment and the Second Circuit's unreported Statement in support thereof, both dated January 7, 1982, and the Second Circuit's Order, dated February 24, 1982, denying Petitioner's subsequent motion for a rehearing, are reproduced at pages 19, 1-4 and 20 of Petitioner's Appendix, respectively.[1]

The Second Circuit's Judgment affirmed (a) a Memorandum Decision dated May 4, 1981 (PA4-17) and a Judgment entered thereon on May 18, 1981 (PA20), by the United States District Court for the Southern District of New York (Stewart, J.), granting Respondents' motion for summary judgment and dismissing Petitioner's complaint, and (b) a Memorandum Decision dated June 11, 1981 (PA 17-19) and a Judgment entered thereon on July 29, 1981 (PA21), by the same District Court, denying Petitioner's motion for reargument and various other forms of post-judgment relief, and granting to Respondents the attorneys' fees incurred by them in opposing Petitioner's said motion.[2]

Counterstatement of the Case

Petitioner's statement of the case, and indeed his entire Petition, is replete with misstatements of fact, distortions of the record and gratuitous attacks upon the personal integrity of Respondents, their attorneys and the Courts below—

1. Hereinafter, we adopt the citation form set forth at page 1, note 1 of the Petition.

2. Contrary to Petitioner's statement (Petition pp. 1-2), the District Court's Memorandum Decisions are officially reported at 519 F. Supp. 83.

all of which are totally baseless.[3] As virtually all of those misstatements, distortions and attacks are irrelevant to the merits of Respondents' successful motion for summary judgment, they do not merit a response. Rather, we shall limit this response to relevant matters. However, our failure to respond to particular matters contained in the Petition should not be construed as agreement with Petitioner's description of those matters.

Petitioner has reproduced in his Appendix (at PA56-62) all but two paragraphs of the Counterstatement of the Case which was contained in Respondents' Brief to the Second Circuit. Rather than repeat it herein, we reproduce below the two paragraphs thereof omitted from Petitioner's Appendix, and we respectfully refer this Court to that complete Counterstatement as an accurate description of the relevant proceedings below:

> "Plaintiff, an owner of 275 shares of Class C Preferred Stock, $.20 par value ('C Stock'), of defendant Management Assistance Inc. ('MAI') (footnote omitted), commenced this class action on August 1, 1978, to enjoin defendants from voting proxies, obtained by a proxy statement mailed to all shareholders on June 28, 1978 ('Proxy Statement') (32a), in connection with MAI's proposed redemption of C Stock. The complaint (6a) also sought injunctive relief against the

3. Typical of Petitioner's baseless, irresponsible and scurrilous statements is his charge that we, as Respondents' attorneys, "surreptitiously record[ed]" a telephone conversation with Petitioner prior to the commencement of this action (Petition p. 5n.3). We categorically deny having taped that, or any other, conversation with Petitioner or his attorney. Another is the scurrilous attack (Petition p. 25) on MAI and its present chairman Raymond Kurshan, on the ground that a former chief executive officer was sued; aside from the unacceptable suggestion of guilt by former association, Petitioner fails to mention that the allegations in the very old complaint were never upheld by any court.

consummation of the redemption, as well as damages in an amount not to exceed $41,582,705 plus interest, punitive damages in the amount of $20,959,025, and attorneys' fees in the amount of $838,361.

* * *

"The redemption proposal was overwhelmingly approved by MAI's shareholders: 87.96 percent of the outstanding C shares and 66.89 percent of the outstanding common shares were voted in favor of the redemption, while only 2.93 percent of the outstanding C shares and .89 percent of the outstanding common shares were voted against it. Based on that vote, the redemption was consummated on September 28, 1978 (271a)."

Summary of Argument

1. Summary judgment was particularly appropriate here because Petitioner did not even attempt to carry his burden of setting forth, by affidavit (or other admissible evidence), specific facts showing that there was a genuine issue for trial. Petitioner was not entitled to deferral of summary judgment pending discovery because he failed to demonstrate the necessity for such discovery.

2. Petitioner's claims with respect to the propriety of the Supplementary Proxy Statement lack merit because the demonstrated sufficiency of the original Proxy Statement made the Supplementary Proxy Statement superfluous, Petitioner offered no factual support for his attacks on the sufficiency of the Supplementary Proxy Statement, and MAI was not required to make a completely new proxy solicitation or to obtain the District Court's advance approval of the Supplementary Proxy Statement.

3. The information sought by Petitioner concerning the $16.8 million intercorporate credit was disclosed in the proxy materials; all other related information Petitioner sought was irrelevant and immaterial. Petitioner's claim that there was a 1974 securities law violation with respect to the issuance of the C Stock is factually and legally baseless. Petitioner's claim of waste and diversion of assets was a pendent state law claim properly dismissed with prejudice because the District Court properly addressed that claim in conjunction with its review of the federal claims, and the record demonstrates that the pendent claim was baseless.

4. Petitioner's claims with respect to the alleged "real purpose" of the directors in proposing redemption of the C Stock lack merit because there is no factual support in the record for those claims and proxy materials need not contain descriptions of directors' motives and purposes where, as here, the facts disclosed are sufficient to permit shareholders to reach their own conclusions.

5. Petitioner's protest against the District Court's allegedly "punitive" motive for dismissing the complaint is baseless and inappropriate for Supreme Court review. Respondents were entitled to attorneys' fees on Petitioner's post-judgment motion because the District Court's finding that the motion was "frivolous and wholly without merit" was well grounded in the record.

Argument

Rule 17.1 of the Rules of this Court provides that a petition for writ of certiorari "will be granted only when there are special and important reasons therefor." No such reason exists in this case. Respondents' motion for summary judgment dismissing the complaint was properly granted because there were no genuine issues of material fact and Respondents were entitled to judgment as a matter of law by the application of well settled legal principles which do not warrant the attention of this Court:

I

Petitioner did not submit any affidavits (or other admissible proof) in support of the allegations in his complaint[4] and thus failed to raise any genuine issues of material fact in opposition to Respondents' motion for summary judgment. Fed.R.Civ.P. 56(c), 56(e); *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 159n.20 (1970); *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 289 (1968); *Ness* v. *Marshall*, 660 F.2d 517, 519 (3d Cir. 1981); *Burst* v. *Adolph Coors Co.*, 650 F.2d 930, 932 (8th Cir. 1981); *SEC* v. *Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978); *Donnelly* v. *Guion*, 467 F.2d 290, 291 (2d Cir. 1972).

Moreover, as noted by the Courts below (PA2, 8, 12 & n.6, 15, 16), Petitioner admitted at his deposition that many

4. The only affidavits submitted by Petitioner in opposition to Respondents' motion for summary judgment were conclusory attorney's affidavits (947A, 950A, 962A) submitted in support of Petitioner's motions for an adjournment and to defer summary judgment pending discovery; none of those affidavits addressed the merits of the summary judgment motion.

of the allegations in his complaint were based upon nothing more than conjecture and speculation, and thus were properly dismissible by summary judgment. *SEC* v. *Research Automation Corp., supra,* 585 F.2d at 33; *Williams* v. *McAllister Brothers Inc.,* 534 F.2d 19, 24 (2d Cir. 1976); *Dressler* v. *MV Sandpiper,* 331 F.2d 130, 132-33 (2d Cir. 1964); *Horwitz* v. *Sprague,* 440 F. Supp. 1346, 1351-52 (S.D.N.Y. 1977).

Petitioner also failed to make the showing required by Fed.R.Civ.P. 56(f) in support of his motion to defer summary judgment pending discovery, and thus that motion was properly denied below. The affidavits of Petitioner's attorney (951A-952A, 963A) stating, in wholly conclusory fashion, that discovery would be necessary to oppose the motion for summary judgment were clearly insufficient. *Contemporary Mission, Inc.* v. *United States Postal Service,* 648 F.2d 97, 107 (2d Cir. 1981); *Over The Road Drivers, Inc.* v. *Transport Insurance Co.,* 637 F.2d 816, 820 (1st Cir. 1980); *SEC* v. *Spence & Green Chemical Co.,* 612 F.2d 896, 900-01 (5th Cir. 1980), *cert. denied,* 449 U.S. 1082 (1981); *Willmar Poultry Co.* v. *Morton-Norwich Products, Inc.,* 520 F.2d 289, 294 (8th Cir. 1975), *cert. denied,* 424 U.S. 915 (1976).

II

Petitioner's attack on MAI's Supplementary Proxy Statement is irrelevant, factually unsupported and without any legal basis.

First, the propriety of the Supplementary Proxy Statement is an academic question because the District Court

unequivocally found that "there were no deliberate nor material omissions from the initial proxy" (PA10).

Second, since, as noted, Petitioner did not submit any factual affidavits in opposition to Respondents' motion for summary judgment, there is no support for his present claims (Petition pp. 10-16) as to the "true purpose" of the Supplementary Proxy Statement, that it was "falsified" or "deliberately withheld" or that MAI shareholders lacked sufficient time to change their proxies if they so desired.

Finally, Petitioner's arguments (Petition pp. 16-22) that complete resolicitation of proxies and advance approval of the Supplementary Proxy Statement by the District Court were required are both without legal merit. *Missouri Portland Cement Co.* v. *H.K. Porter Co.*, 535 F.2d 388, 396 (8th Cir. 1976); *Sonesta International Hotels Corp.* v. *Wellington Associates*, 483 F.2d 247, 255 (2d Cir. 1973); *Corenco Corp.* v. *Schiavone & Sons, Inc.*, 488 F.2d 207, 214-15 (2d Cir. 1973); *Bertoglio* v. *Texas International Co.*, 488 F. Supp. 630, 654-55 (D. Del. 1980); *Cohen* v. *Ayers*, 449 F. Supp. 298, 315 (N.D. Ill. 1978), *aff'd*, 596 F.2d 733 (7th Cir. 1979); *Lessler* v. *Dominion Textile Ltd.*, 411 F. Supp. 40, 42 (S.D.N.Y. 1975); *Ronson Corp.* v. *Liquifin Aktiengesellschaft*, 370 F. Supp. 597, 602 (D.N.J.), *aff'd*, 497 F.2d 394 (3d Cir.), *cert. denied*, 419 U.S. 870 (1974); *Abramson* v. *Nytronics, Inc.*, 312 F. Supp. 519, 524-26 (S.D.N.Y. 1970).[5]

5. The cases cited by Petitioner (Petition pp. 16-17) in which resolicitation of proxies was required are all inapposite because, among other things, they involved multiple and/or extreme violations of the proxy rules. In any event, Petitioner admits that resolicitation is not required in every case (Petition p. 18) and there is nothing in the record indicating that the Courts below abused their discretion in determining that resolicitation was not required in this case. Indeed, such resolicitation would have been superfluous since, as noted, the initial proxy materials were found to be complete and accurate in all respects.

III

Petitioner's claims with respect to the alleged diversion by MAI of $16,800,000 of the assets of Genesis One Computer Corporation ("GOCC"), the wholly-owned subsidiary whose Cash Flow From Operations (as defined; see 97A) would have been the source of C Stock dividends, are factually and legally baseless.

As the Courts below found (PA2, 15n.8), the existence of this intercompany debt and the fact that it was non-interest bearing were fully disclosed in MAI's proxy materials (see PA53-54). The "explanation" of other aspects of this item sought by Petitioner (*e.g.*, "how long the situation had existed;" Petition p. 24) was immaterial, especially in view of the fact that repayment of the debt by MAI would not have resulted in C Stock dividends since it would not have been included in the definition of Cash Flow From Operations (see 97A).[6] Hence, there was no violation of the proxy rules.

Petitioner's claim that "There Was a 1974 Securities Violation" (Petition p. 24) is improperly raised here because it is based on "a fact issue as to intent in 1974" (*id.*) as to which Petitioner offered no evidence below. In any event, Respondents affirmatively demonstrated below that there was no impropriety as to the issuance of the C Stock in 1974 (313A-314A); indeed, the proxy statement and prospectus relating thereto were fully reviewed, as required, by the Securities and Exchange Commission.

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6. In any event, the record is clear that MAI regularly kept its shareholders and the SEC informed as to all relevant aspects of the intercompany debt (see, *e.g.*, 475A, 1075A, 1084A, 1087A, 1090A, 1093A; see generally 1049A-1053A).

Petitioner's claim of waste and diversion of assets is not only unsupported by any evidence in the record,[7] but it also does not even rise to the level of a federal securities law claim. *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 477-79 (1977); *Gaines* v. *Haughton*, 645 F.2d 761, 776-79 (9th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1006 (1982); *Browning Debenture Holders' Committee* v. *DASA Corp.*, 560 F.2d 1078, 1084 (2d Cir. 1977); *Gluck* v. *Agemian*, 495 F. Supp. 1209, 1213-14 (S.D.N.Y. 1980); *Merritt* v. *Colonial Foods, Inc.*, 499 F. Supp. 910, 913-14 (D. Del. 1980).

Rather, Petitioner's claim is a state law claim that requires a showing of bad faith on the part of MAI's directors. *Galef* v. *Alexander*, 615 F.2d 51, 57 (2d Cir. 1980); *Schenker* v. *E.I. du Pont de Nemours & Co.*, 329 F.2d 77, 79 (2d Cir.), *cert. denied*, 377 U.S. 998 (1964); *Elfenbein* v. *American Financial Corp.*, 487 F. Supp. 619, 627 (S.D.N.Y. 1980), *aff'd*, 652 F.2d 53 (2d Cir. 1981); *Pollitz* v. *Wabash R.R. Co.*, 207 N.Y. 113, 124, 100 N.E. 721, 723-24 (1912); *Greenbaum* v. *American Metal Climax, Inc.*, 27 A.D.2d 225, 231, 278 N.Y.S.2d 123, 129 (1st Dept. 1967). Since, as noted, Petitioner failed to make such a showing, his state law claim was properly dismissed.[8]

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7. As the District Court stated, "No factual information by affidavit or otherwise is offered in support of this speculation" (PA15 n.8), and Petitioner admitted at his deposition that he had no basis for those allegations (596A-599A). By contrast, Respondents affirmatively demonstrated, in their affidavits in support of their motion for summary judgment, that no such waste or diversion had occurred (316A-319A).

8. Petitioner's argument that he should have been permitted to pursue his state law claim in state court is without merit. Well settled principles of pendent jurisdiction permit a District Court, in its discretion, to dispose of pendent state law claims on the merits

(footnote continued on next page)

IV

Petitioner's claim that factual issues as to Respondents' "purpose and intent" in proposing the redemption of the C Stock precluded summary judgment are factually and legally without merit.

Since, as noted, Petitioner did not submit *any* factual affidavits in opposition to Respondents' summary judgment motion, the record is barren of any evidence in support of Petitioner's speculations that Respondents' motives were to "freeze out" the C shareholders from participating in future MAI profits.[9] Hence, that issue is not properly raised here.

Moreover, there is no requirement that proxy materials disclose directors' motivations where, as here, sufficient facts are furnished from which shareholders can reach their own conclusions.[10] *Rodman* v. *Grant Foundation*, 608 F.2d 64, 71-72 and n.5 (2d Cir. 1979); *Golub* v. *PPD*

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despite the dismissal of the federal claims. *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725-27 (1966); *Rosado* v. *Wyman*, 397 U.S. 397, 405 (1970); *Hagans* v. *Lavine*, 415 U.S. 528, 545-46 (1974); *Lentino* v. *Fringe Employee Plans, Inc.*, 611 F.2d 474, 478-79 (3d Cir. 1979). And, it is appropriate to address, and dispose of, pendent claims on a motion for summary judgment. See, *e.g.*, *Ryan* v. *J. Walter Thompson Co.*, 453 F.2d 444 (2d Cir. 1971), *cert. denied*, 406 U.S. 907 (1972); see also *State of Arizona* v. *Cook Paint and Varnish Co.*, 541 F.2d 226, 228 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977).

9. Petitioner's reference (Petition p. 27n.21) to purported "admissions" by Respondents is unsupported by any citation to the record, and in fact there were no such admissions.

10. Here it is obvious from the terms of the proposed redemption that the C shareholders would not be participating in MAI's future business activities, which Petitioner claims was the "real purpose behind the redemption" (Petition p. 27).

Corp., 576 F.2d 759, 765 (8th Cir. 1978); *Selk* v. *St. Paul Ammonia Products, Inc.*, 597 F.2d 635, 639 (8th Cir. 1979); *Lewis* v. *Oppenheimer & Co.*, 481 F. Supp. 1199, 1204 (S.D.N.Y. 1979); *Doyle* v. *Milton*, 73 F. Supp. 281, 286 (S.D.N.Y. 1947). See also *Browning Debenture Holders' Committee* v. *DASA Corp.*, *supra*, 560 F.2d at 1084.[11]

V

Petitioner's final argument is that the dismissal of his complaint somehow constituted a "forfeiture"[12] visited upon him by a Court which "was in a punitive frame of mind" and which should have "better controlled the situation" to protect Petitioner from the admitted shortcomings of his attorney (Petition pp. 28-30). This totally baseless argument not only unfairly impugns the integrity of the District Court, but also fails to present any "special and important" circumstances justifying the time and attention of this Court.

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11. Petitioner's reliance (Petition p. 27) on *SEC* v. *Parklane Hosiery Co.*, 558 F.2d 1083 (2d Cir. 1977), is misplaced because there, unlike here, no facts were disclosed from which the shareholders could deduce the principal shareholder's alleged motives and, in addition, those motives violated state law.

12. Petitioner also complains that the District Court's award to Respondents of attorneys' fees in the amount of $6,000, incurred by them in opposing Petitioner's motion for post-judgment relief, was a "penalty" (Petition p. 30). However, that award was proper because, as the District Court found, Petitioner's motion (which sought, among other things, $100,000 in attorneys' fees for having brought, prosecuted and lost the action) was "frivolous and wholly without merit" (PA19). See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258-59 (1975); *Hall* v. *Cole*, 412 U.S. 1, 5, 15 (1973); *Interstate Cigar Co.* v. *Sterling Drug Inc.*, 655 F.2d 29, 32 (2d Cir. 1981); *Nemeroff* v. *Abelson*, 620 F.2d 339, 348 (2d Cir. 1980); *Browning Debenture Holders' Committee* v. *DASA Corp.*, *supra*, 560 F.2d at 1087-88; *Gerstle* v. *Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1309 (2d Cir. 1973); 6 Moore *Federal Practice*, ¶ 54.77 [2] at 1709-12 (2d ed. 1982).

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied in all respects.

Dated: New York, New York
August 26, 1982

Respectfully submitted,

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